



General Assembly

February Session, 2002

Raised Bill No. 5622

LCO No. 2062

Referred to Committee on General Law

Introduced by:
(GL)

AN ACT CONCERNING RETAINAGE.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective January 1, 2003*) This act shall be known
2 as the "Retainage Act".

3 Sec. 2. (NEW) (*Effective January 1, 2003*) As used in this act:

4 (1) "Construction" means building, altering, repairing, installing or
5 demolishing in the ordinary course of business any: (A) Road,
6 highway, bridge, parking area or related project; (B) building, stadium
7 or other structure; (C) airport, subway or similar facility; (D) park,
8 trail, athletic field, golf course or similar facility; (E) dam, reservoir,
9 canal, ditch or similar facility; (F) sewage or water treatment facility,
10 power generating plant, pump station, natural gas compression station
11 or similar facility; (G) sewage, water, gas or other pipeline; (H)
12 transmission line; (I) radio, television or other tower; (J) water, oil or
13 other storage tank; (K) shaft, tunnel or other mining appurtenance; (L)
14 electrical wiring, plumbing or plumbing fixture, gas piping, gas
15 appliances or water conditions; (M) air conditioning conduit, heating
16 or other similar mechanical work; (N) leveling or clearing land; (O)

17 excavating earth; (P) drilling wells of any type, including
18 seismographic shot holes or core drilling; and (Q) similar work,
19 structures or installations.

20 (2) "Contractor" means a person performing construction through a
21 contract with an owner;

22 (3) "Owner" means a person, local public body or state agency other
23 than the Department of Transportation.

24 (4) "Person" means an individual, corporation, business trust, estate,
25 trust, partnership, limited liability company, association, joint venture
26 or similar legal entity;

27 (5) "Retainage" means money payable to the contractor or
28 subcontractor that has been withheld by the owner conditioned on
29 substantial completion of all work in connection with a construction
30 contract; and

31 (6) "Subcontractor" means a person performing construction for the
32 owner not through a contract with the owner.

33 Sec. 3. (NEW) (*Effective January 1, 2003*) The provisions of this act do
34 not apply to construction contracts for residential property containing
35 four or fewer dwelling units.

36 Sec. 4. (NEW) (*Effective January 1, 2003*) (a) Except as otherwise
37 provided in this section, retainage shall not be withheld on any
38 construction contract unless an escrow arrangement is used. Securities
39 may be offered by a contractor or subcontractor in lieu of retention.

40 (b) A local public body may provide in its bidding documents the
41 manner in which retainage is to be held. Retainage by a local public
42 body shall be in a noninterest bearing account. A local public body
43 may combine retainage from more than one project into a single
44 account.

45 (c) A manufacturing plant engaged in at least ten construction
46 projects at the same time may serve as its own escrow agent. All other
47 conditions pertaining to escrow accounts shall apply to a
48 manufacturing plant that serves as its own escrow agent.

49 Sec. 5. (NEW) (*Effective January 1, 2003*) (a) Except as otherwise
50 provided in subsection (b) of this section, all construction contracts
51 shall provide that payment for amounts due, except for retainage, shall
52 be paid within thirty days after the owner receives an undisputed
53 request for payment. Payment by the owner to the contractor may be
54 made by first-class mailing, electronic funds transfer or hand delivery
55 of the undisputed amount of a pay request based on work completed
56 or service provided under the contract. If the owner fails to pay the
57 contractor within thirty days after receipt of an undisputed request for
58 payment, the owner shall pay interest to the contractor beginning on
59 the thirty-first day after payment was due, computed at one and one-
60 half per cent of the undisputed amount per month or fraction of a
61 month until payment is issued. If an owner receives an improperly
62 completed invoice, such owner shall notify the sender of the invoice
63 within seven days of receipt in what manner the invoice is improperly
64 completed, and such owner shall have no further duty to pay on the
65 improperly completed invoice until it is resubmitted as complete.

66 (b) A local public body may make payments within forty-five days
67 after submission of an undisputed request for payment when grant
68 money is a source of funding, if the construction contract specifically
69 provides in a clear and conspicuous manner for a payment later than
70 thirty-one days after submission of an undisputed request for
71 payment.

72 (c) All construction contracts shall provide that contractors and
73 subcontractors make prompt payment to their subcontractors and
74 suppliers for amounts owed for work performed on the construction
75 project within seven days after receipt of payment from the owner,
76 contractor or subcontractor. If the contractor or subcontractor fails to

77 pay his subcontractor and suppliers by first class mail or hand delivery
78 within seven days of receipt of payment, the contractor or
79 subcontractor shall pay interest to his subcontractors and suppliers
80 beginning on the eighth day after payment was due, computed at one
81 and one-half per cent of the undisputed amount per month or fraction
82 of a month until payment is issued. Said payment provisions shall
83 apply to all tiers of contractors, subcontractors and suppliers.

84 (d) A creditor shall not collect, enforce a security interest against,
85 garnish or levy execution on those retainage, progress payments or
86 other payments that are owed by an owner, contractor or
87 subcontractor to a person, or his surety, who has furnished labor or
88 material pursuant to a construction contract.

89 (e) When making payments, the owner shall retain no more than
90 seven and one-half per cent of the cost of estimated work done and
91 value of materials stored on the site or suitably stored and insured off-
92 site. When the project has been substantially completed, no further
93 retainage shall be withheld. A contractor shall retain no more than
94 seven and one-half per cent retainage, regardless of whether retainage
95 is withheld by the owner.

96 (f) Retainage may be held until substantial completion of each
97 separate building, public work or other division of the contract on
98 which a price is stated separately in the contract or that can be
99 separately ascertained from the contractor's schedule of values if the
100 escrow arrangement described in section 6 of this act is used.

101 Sec. 6. (NEW) (*Effective January 1, 2003*) An escrow account,
102 established pursuant to an escrow agreement, shall be entered into
103 only on the following conditions:

104 (1) Only state or national banks chartered with the state or savings
105 and loan associations domiciled in the state may serve as escrow agent;

106 (2) The escrow agent shall provide monthly reports to the owner,

107 the contractor and the subcontractor as to the amount of the escrow
108 account held by the escrow agent and any additions to the escrow
109 account. Withdrawals from the escrow account shall be made only
110 subject to approval of the owner;

111 (3) If the owner has entered into more than one construction
112 contract allowing for the maintenance of escrow accounts, the owner
113 may elect to combine the amounts held as retainage under each
114 contract into one or more escrow accounts or may establish a separate
115 escrow account for each contract;

116 (4) Upon default or overpayment, as determined by a court of
117 competent jurisdiction, the escrow agent shall deliver a cashier's check
118 within ten days to the owner in the amount of the default or
119 overpayment; provided the amount is subject to the redemption value
120 of the investments at the time of disbursement;

121 (5) The escrow account may be terminated upon completion and
122 acceptance of the contract as provided in this act;

123 (6) All fees and expenses of the escrow agent shall be paid by the
124 owner;

125 (7) The escrow account constitutes a specific pledge to the owner,
126 and the contractor or subcontractor shall not, except to its surety,
127 otherwise assign, pledge, discount, sell or transfer his interest in the
128 escrow account, and money in the escrow account is not subject to
129 levy, garnishment, attachment or other process;

130 (8) The form and provisions of the escrow agreement shall be
131 included in all solicitations for construction services and shall be given
132 to the contractor and subcontractors prior to entering into a contract;

133 (9) The owner is not liable to the contractor, subcontractor or their
134 sureties for the failure of the escrow agent to perform under the escrow
135 agreement, or for the failure of a financial institution to honor
136 investments issued by it that are held in the escrow account; and

137 (10) An escrow agent is not liable to a party to the escrow agreement
138 unless the escrow agent is found by a court of competent jurisdiction
139 to have breached his fiduciary duty to a beneficiary of the escrow
140 agreement.

141 Sec. 7. (NEW) (*Effective January 1, 2003*) All material and work
142 covered by partial payments become the property of the owner, but
143 the contractor and subcontractor are not relieved from the sole
144 responsibility for the care and protection of materials and work for
145 which payments have been made; provided, the contractor and
146 subcontractor have no duty for the care and protection of materials
147 and work after the owner has assumed occupancy or use of the work.

148 Sec. 8. (NEW) (*Effective January 1, 2003*) Ten days after certification
149 of completion, any amounts remaining due the contractor or
150 subcontractor under the terms of the contract shall be paid upon the
151 presentation of the following:

152 (1) A properly executed release and duly certified voucher for
153 payment;

154 (2) A release, if required, of all claims and claims of lien against the
155 owner arising under and by virtue of the contract other than such
156 claims of the contractor, if any, as may be specifically excepted by the
157 contractor or subcontractor from the operation of the release in stated
158 amounts to be set forth in the release; and

159 (3) Proof of completion.

160 Sec. 9. (NEW) (*Effective January 1, 2003*) If a dispute arises between
161 the owner and the contractor or subcontractor as to work performed or
162 materials supplied, the owner is only entitled to retain the amount that
163 is reasonably calculated by such owner to cover the cost to correct a
164 deficiency in the work or materials supplied. All other money due to
165 the contractor or subcontractor pursuant to this act shall be paid as
166 provided in this act. The money retained by the owner as provided in

167 this section shall be deposited into the escrow account for the benefit of
168 the contractor or subcontractor. Any money retained by the owner as
169 provided in this section shall not be paid to the contractor or
170 subcontractor until the dispute has been resolved.

171 Sec. 10. (NEW) (*Effective January 1, 2003*) If an owner fails to deposit
172 retainage that is withheld or to release retainage as required by this
173 act, the owner shall pay an additional one and one-half per cent of the
174 amount not deposited or released for each month or part of a month
175 until retainage is paid.

176 Sec. 11. (NEW) (*Effective January 1, 2003*) In an action to enforce the
177 provisions of this act, the court may award court costs and reasonable
178 attorney fees.

This act shall take effect as follows:	
Section 1	<i>January 1, 2003</i>
Sec. 2	<i>January 1, 2003</i>
Sec. 3	<i>January 1, 2003</i>
Sec. 4	<i>January 1, 2003</i>
Sec. 5	<i>January 1, 2003</i>
Sec. 6	<i>January 1, 2003</i>
Sec. 7	<i>January 1, 2003</i>
Sec. 8	<i>January 1, 2003</i>
Sec. 9	<i>January 1, 2003</i>
Sec. 10	<i>January 1, 2003</i>
Sec. 11	<i>January 1, 2003</i>

Statement of Purpose:

To apply retainage provisions to public and certain private construction contracts, to require specific payment schedules in construction contracts, and to establish escrow accounts under certain conditions.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]